

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 North 5th Street
Kansas City, Kansas 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

In the matter of:

TIMMERMAN & SONS
FEEDING CO., INC

Springfield, NE

Respondent

Proceedings under
Section 309(a)(3)
of the Clean Water Act,
33 U.S.C. § 1319(a)(3)

DOCKET NO. CWA-07-2003-0207

FINDINGS OF VIOLATION
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance ("Order") are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA Region VII, and redelegated to the Director of Region VII's Water, Wetlands, and Pesticides Division.

2. The Respondent is Timmerman & Sons Feeding Co., Inc., ("Respondent"), who owns and operates an animal feeding operation located in the North ½ of Section 21, Township 13N, Range 11E of Sarpy County, Nebraska.

Statutory and Regulatory Authority

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include biological materials and agricultural waste discharged to water.

8. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation... from which pollutants are or may be discharged."

9. "Concentrated animal feeding operation" is defined by 40 C.F.R. § 122.23(b)(3) as "an 'animal feeding operation' which meets the criteria in Appendix B of this part."

10. Appendix B to 40 C.F.R. § 122.23 states that an animal feeding operation is a concentrated animal feeding operation if the animal feeding operation confines more than 1,000 slaughter and feeder cattle.

11. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

12. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the state of Nebraska with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the CWA, the Nebraska Environmental Protection Act [Secs. 81-1504 (11), Reissue 1987], and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Findings of Violation

13. Timmerman & Sons Feeding Co., Inc. is a corporation and is therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Timmerman & Sons Feeding Co., Inc. operates an animal feeding operation ("Facility") located in the North ½ of Section 21, Township 13N, Range 11E of Sarpy County, Nebraska.

15. On February 19, 2003, EPA conducted an NPDES inspection of Respondent's animal feeding operation.

16. At the time of the inspection, the Facility confined approximately 7,959 cattle. Since at least July 1998, the number of cattle confined at the Facility has been equivalent to at least 1,000 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.

17. From at least July 1998 to the present, the Facility has confined and fed or maintained cattle for a total of 45 days or more in any 12-month period.

18. From at least July 1998 to the present, neither crops, vegetation, forage growth, nor post-harvest residues have been sustained over any portion of the Facility.

19. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. 122.23(b)(3).

20. The Facility is a "point source" as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).

21. NDEQ granted a NPDES Permit, No. 0037419 on May 3, 1989, to Timmerman & Sons Feeding Co. for the Springfield facility. Respondent's NPDES Permit No. 0037419 has been reissued by NDEQ and administratively extended through the present date, and remains fully effective and enforceable.

22. Animal wastes and runoff from the confined feeding areas at the Springfield Facility are diverted via dikes into three settling basins. Liquid overflow is transferred via pipe into a waste retention pond until wastes are disposed of through land application to the surrounding acreage. Any uncontrolled runoff from the confined feeding areas or settling basins on the Springfield Facility's western portion would flow west into a drainage ditch bordering the west side of the facility, continuing south into a tributary supplying Buffalo Creek. Any uncontrolled runoff from the eastern portion of the Springfield Facility would flow generally south into a

tributary flowing into Buffalo Creek.

23. Part I.A. of NPDES Permit No. 0037419 sets forth the limitations on discharge of pollutants from the Springfield Facility, as follows:

A. Discharge shall occur from the overflow of a waste control facility only as a result of runoff from:

- a) A precipitation event greater than the 25-year, 24-hour storm (5.4 inches of rain), or
- b) Precipitation events from several lesser storms, over a period of time, producing runoff volume exceeding the minimum storage capacity, and suitable disposal conditions do not exist. This occurrence shall be considered a "chronic wet period" and determined by this Department.

24. At the time of the EPA inspection on February 19, 2003, uncontrolled wastewater runoff was flowing into surface waters from two areas of the Springfield Facility:

- A. Wastewater runoff from the Springfield Facility's northwest series of cattle pens was flowing west into a county road ditch and then south into a tributary of Buffalo Creek.
- B. Wastewater runoff from the southwest group of pens and settling basin on the Springfield Facility's eastern side was flowing to the southwest and into a tributary of Buffalo Creek.

25. The ditch and tributary to which wastewater was discharged from the Springfield Facility are "waters of the U.S." as defined by 40 C.F.R. § 122.2.

26. The discharges were not the result of runoff from a precipitation event greater than the 25-year, 24-hour storm or a "chronic wet period."

27. Respondent's discharges of wastewater from the Facility to the ditch and unnamed tributary of Buffalo Creek in February 2003 were not authorized by Respondent's NPDES permit, and thus were discharges of pollutants from a point source to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

28. Part II.A. of NPDES Permit No.0037419 sets forth the operating requirements for the Springfield Facility:

1. Livestock waste control facilities shall be operated according to the following minimum requirements:

a) The diversion dikes, debris basins and field sinks shall be maintained to function as originally designed.

b) The diversion dikes and debris basins shall be cleaned of solids as necessary to maintain the designed capacity.

2. Field application of collected livestock wastes shall not exceed a practical limit as determined by soil permeability, cover material, agronomic loading rate and other relevant considerations.

29. At the time of the EPA inspection on February 19, 2003, certain aspects of the diversion dikes and debris basins at Respondent's Springfield Facility had not been maintained as originally designed. On the Springfield Facility's eastern side, the waste transfer pipe used to transport waste from settling basin 2 to the primary retention pond was clogged and not functioning as designed, resulting in excessive wastewater accumulation in the settling basin.

30. At the time of the EPA inspection on February 19, 2003, an erosion channel had developed on the containment berm of settling basin 2, and thus the berm was not functioning to contain wastewater as intended. The erosion channel was vegetated, indicating that the channel, which would carry wastewater runoff from the settling basin to the unnamed tributary to Buffalo Creek, had been present at least one growing season.

31. Respondent's failure to properly maintain the diversion dikes and debris basins to function as originally designed is in violation of NPDES Permit No. NE 0037419, and a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

32. Sections A.3 and A.4 of Appendix A of the NPDES permit for the Springfield Facility set forth the monitoring and record-keeping requirements for the Facility, as follows:

A. Appendix A, Section A.4.(a)-(c) of NPDES Permit No. 0037419 requires the facility operator to monitor and record information on liquid disposal practices, which must include the date, time and duration of disposal, the rate of disposal, and the application area utilized.

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B. Appendix A, Section A.4.(d) of NPDES Permit No. 0037419 requires the facility operator to monitor and record on a daily basis the amount of precipitation received at the Facility.

C. Appendix A, Section A.4.(e) of NPDES Permit No. 0037419 requires the facility operator to monitor and record on a daily basis the liquid level of the livestock waste retention structures.

D. Appendix A, Section A.3 of NPDES Permit No. 0037419 requires the facility operator to retain all records required by the permit for a period of three years from the date of the measurement or report.

33. At the time of the EPA inspection, Respondent did not have complete records of liquid disposal practices at the Springfield facility for anytime during the period from July 1998 until April 2003.

34. At the time of the EPA inspection, Respondent did not have records of the amount of precipitation received at the Springfield Facility for thirty eight months during the period from July 1998 until April 1993.

35. At the time of the EPA inspection, Respondent did not have any records of the liquid level of the livestock waste retention structure at the Springfield facility for anytime during the period from July 1998 until April 2003.

36. Respondent's failure to monitor and record precipitation amounts, liquid waste levels, and liquid disposal practices is in violation of NPDES Permit No. NE 0037419, and a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

Compliance Order

Based on the Findings of Violation set forth above, and pursuant to Sections 309(a)(3) and 311(e) of the CWA, 33 U.S.C. §§ 1319(a)(3), 1321(e), Respondent is hereby ORDERED to take the following actions to eliminate its violations of permit conditions and the CWA:

37. Respondent shall establish and implement procedures to regularly inspect all aspects of Respondent's waste management system, to ensure that the diversion dikes, debris basins and other aspects of Respondent's waste management system are maintained to function as originally designed. The procedures should include the planned frequency of inspections, scope of the inspections, and documentation of results of the inspections. Within thirty (30) days of receipt of

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this Order, Respondent shall submit to EPA in writing a description of the procedures that Respondent will implement.

38. Respondent shall promptly repair and correct any problems which occur at the Springfield Facility which prevent the diversion dikes, debris basins and other aspects of Respondent's waste management system from functioning as originally designed.

39. Respondent shall perform monitoring and recordkeeping of precipitation, land application activities, and holding pond liquid levels, as required by Respondent's NPDES permit.

Effect of Order

40. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.

41. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.

42. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

43. If any provision or authority of this Order, or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

44. All submissions to EPA required by this Order shall be sent to:

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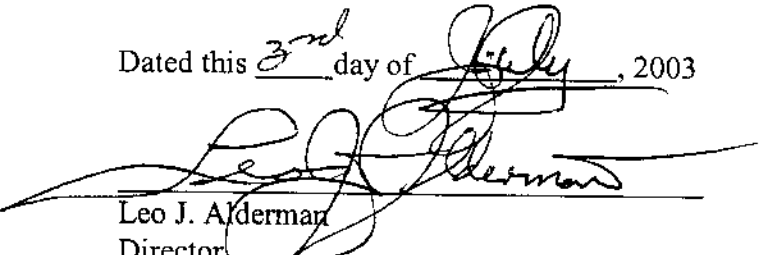
Paula Higbee
CAFO Enforcement Coordinator
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, KS 66101

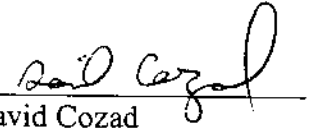
45. Pursuant to 40 C.F.R. §§ 2.201 - 2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

46. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$27,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

47. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Dated this 3rd day of July, 2003


Leo J. Alderman
Director
Water, Wetlands, and Pesticides Division


David Cozad
Associate Regional Counsel

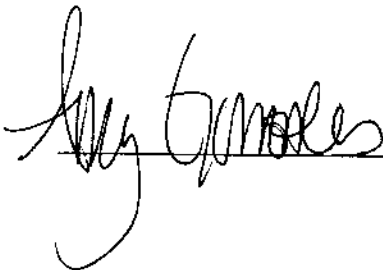
CERTIFICATE OF SERVICE

I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII. I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following representative of Timmerman and Sons Feeding Co., Inc.:

Mr. Gerald Timmerman
Timmerman and Sons Feeding Co., Inc.
165 South 2nd Street
Springfield, NE 68059

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Nebraska:

Dennis Heitmann
Supervisor, Agriculture Section
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, NE 68509



7/3/03

Date